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In the Supreme Court of the United States

OCTOBER TERM, 1972

Supreme Court, U.
FILED
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MICHAEL RODAK, JR.,

No. 72-699

S. I. HAYAKAWA, Acting President of San Francisco State College, individually and in his official capacity, and EDWIN C. DUERR, Coordinator of Internal Affairs, San Francisco State College, in his official capacity,

Appellants,

vs.

MASON WONG, PATRICIA WOOLMAN through MORRIS WOOLMAN, her Guardian Ad Litem, and on behalf of all others similarly situated,

Appellees.

Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit

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RESPONSE NOT PRINTED

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No. .....

S. I. HAYAKAWA, Acting President of San Francisco State College, individually and in his official capacity, and EDWIN C. DUERR, Coordinator of Internal Affairs, San Francisco State College, in his official capacity,

Appellants,

vs.

MASON WONG, PATRICIA WOOLMAN through MORRIS WOOLMAN, her Guardian Ad Litem, and on behalf of all others similarly situated,

Appellees.

Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit

---

S. I. Hayakawa and Edwin C. Duerr pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit entered in the above case on August 9, 1972.

OPINIONS BELOW

The order of the United States District Court for the Northern District of the State of California is appended

to this petition as Appendix A. The opinion of the Court of Appeals for the Ninth Circuit is appended as Appendix B.

JURISDICTION

This suit was brought on behalf of Mason Wong and Patricia Woolman, through her Guardian Ad Litem, and on behalf of all others similarly situated, for injunctive relief under 42 U.S.C. § 1983 and 28 U.S.C. § 1343. Jurisdiction was further invoked under the First, Fifth and Fourteenth Amendments to the Constitution of the United States.

Following judgment by the District Court for the Northern District of California, dated April 24, 1969, notice of appeal to the Ninth Circuit was filed on May 7, 1969, and the record from the District Court was transmitted to the Ninth Circuit Court on June 13, 1969. The Ninth Circuit Court affirmed the judgment of the District Court on August 9, 1972.

Petitioner invokes the jurisdiction of this court under 28 U.S.C. § 1254(1) and § 2101(c).

QUESTIONS PRESENTED

1. Do disciplinary proceedings of public colleges and universities which provide students with notice of alleged misconduct, evidence to be offered and the right to present evidence violate the due process guarantees of the Fourteenth Amendment?

2. Can evidence not given under oath, such as police reports, constitute substantial evidence in such disciplinary proceedings?

3. Does attendance at a mass gathering in violation of a school regulation constitute disorderly conduct so as to subject students to discipline by a public college or university?

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STATUTES INVOLVED

Section 41301 of Title 5 of the California Administrative Code provided (at the time in question herein) as follows:

> "Any student of a state college may be placed on probation, suspended, or expelled for one or more of the following causes:
>
> (a) Disorderly, unethical, vicious, or immoral conduct.
>
> (b) Misuse, abuse, theft, or destruction of state property."

The full citation of this statute is appended hereto as Appendix C.

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked because of alleged questions arising under the United States Constitution and federal statutory law prohibiting the deprivation, under color of state law, of rights, privileges and immunities secured by the Fourteenth Amendment.

Appellees Mason Wong and Patricia Woolman and the class they represent are California citizens and students at San Francisco State College, San Francisco, California, against whom disciplinary measures have been initiated or taken for alleged misconduct arising from assemblies and demonstrations which occurred on the campus during the 1968-1969 school year.

During that year demonstrations, speeches, assemblies and other activities occurred on or near the campus of San Francisco State College, the purpose of which was to protest certain actions taken by the administration of the college. Destruction of school property and the interruption of classes and work resulted.

On January 23, 1969, people gathered for a rally on the campus commons in disregard of orders issued by appellant

S. I. Hayakawa, the Acting President of the college. The authorities announced to the crowd that it was participating in an unlawful assembly and ordered it to disperse. Thereafter, members of the San Francisco Police Department arrested approximately 450 persons and charged them with violating California Penal Code § 408 (participation in an unlawful assembly or rout), § 409 (refusal to disperse from the place of an unlawful assembly, rout or riot), and § 415 (disturbing the peace). The criminal prosecutions are still pending.[1]

Subsequent to the arrests, appellees, along with other students, were sent letters signed by appellant S. I. Hayakawa and/or persons acting under his direction. Said letters informed appellees that disciplinary proceedings had been initiated against them, that as a result of these disciplinary proceedings appellees might be placed on probation, suspended or expelled as students of San Francisco State College, that the conduct giving rise to the charges was attendance at and participation in a rally on January 23, 1969, on campus, which was specifically prohibited by the administration of the college. The letter further advised that the police report pertinent to the arrest might be used as evidence in the hearing.

At the hearing, appellants chose not to testify for reasons unconnected to this proceeding. The panel chairman of the Disciplinary Committee then read to them a general police report regarding the activity on campus during the day of appellees' arrest. The Committee concluded that appellees had engaged in such misconduct as to warrant discipline.

The Disciplinary Committee decided to give appellee Woolman a written reprimand. Appellee Wong was disciplined by six-months suspension and two years probation.

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1. There is no issue concerning the interplay between the criminal trials arising from the rally and the disciplinary proceedings. The issue was narrowed by the court below to one of substantial evidence.

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The appellees thereafter brought this action in district court for injunctive relief alleging, in substance, that the Disciplinary Committee misinterpreted and erroneously applied the State statute which permits punishment of students' academically-related misconduct; that the regulations of the college did not provide and appellees were not given fair notice of the disciplinary proceeding; that the procedures were fundamentally unfair and that no proof was adduced which tended to support the Committee's decision and recommendations.

Following a hearing, the court ruled that the claim was not the subject of a class action and could not be prosecuted as such. The court also rejected all of appellees' due process contentions except one: that there was no substantial evidence that the students committed a disorderly act or failed to disperse. The court found that there was no such evidence. It ordered appellants to expunge from the appellees' school records all reference to disciplinary action, to reinstate them to good standing as students and not to take any disciplinary action against them unless supported by substantial evidence. The Court of Appeals for the Ninth Circuit affirmed the district court's decision.

WHY THE WRIT SHOULD BE GRANTED

1. The Decision Fosters Confusion and Conflict as to Procedural Safeguards to Attach in Disciplinary Proceedings.

It is well recognized that due process is a flexible concept dependent on the particular circumstances. *Cafeteria and Restaurant Workers Union, Etc. v. McElroy*, 367 U.S. 886, 895 (1960). It is equally well settled that when the notions of due process are applied to disciplinary proceedings they require that traditional notions of fair play be observed. They do not require the same panoply of procedure safeguards attendant to criminal and civil trials. *Dixon v.*

Alabama State Board of Education, 294 F.2d 150, 158 (5th Cir. 1961). The test is one of reasonableness and therefore must be judged in terms of the context to which the principles are to be applied. *Esteban v. Central Missouri State College*, 415 F.2d 1077, 1090 (8th Cir. 1969), *cert. denied* 398 U.S. 965 (1970).

The precise question as to which procedural safeguards are to attach in disciplinary hearings in public educational institutions has been confronted on numerous previous occasions. The first indication that at least some safeguards are necessary was made by the Fifth Circuit in *Dixon v. Alabama State Board of Education, supra*, which held that an accused student is entitled to notice that he is charged with misconduct, including a statement of the charges alleged in justification of anticipated action against him. The student must also be given the names of witnesses against him and must be informed of the nature of their proposed testimony. The Court specifically warned, however, that "this is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required." *Accord, Esteban v. Central Missouri State College, supra; Wasson v. Trowbridge*, 382 F.2d 807 (2d Cir. 1967); *Wright, The Constitution on the Campus*, 22 *Vand.L.Rev.* 1027, 1072-1082 (1969).

Inherent in holding that the right to cross-examine witnesses is not required is the reasoning that testimony may be in the nature of writings and reports. Implicit in this is the further holding that the testimony against the student may be oral or written but not necessarily under oath. However, in concluding that there was no evidence to support the disciplinary action taken against the appellees herein, despite the police report and affidavits, the court below in substance held that written reports or written evidence not under oath are not substantial evidence and

may not be used to justify disciplinary action. It is submitted that this holding is in conflict with *Dixon v. Alabama State Board of Education, supra.*

In addition to notice and the names of witnesses, the court in *Dixon v. Alabama State Board of Education, supra,* held that accused students must be given the opportunity to present a defense, either orally or in writing. *Accord, Wright v. Texas Southern University,* 392 F.2d 728, 729 (5th Cir. 1968). It follows that if the accused can present his defense in writing, the institution should also be permitted to present its evidence in similar form. There are no cases to the contrary. Moreover, it has been stated that the courts "should accept any institutional procedure so long as it is reasonably calculated to be fair to the student involved and to lead to a reliable determination of the issues." Wright, *The Constitution and the Campus,* 22 *Vand.L.Rev.* 1027, 1060 (1969). Of course, any such determination must be based on substantial evidence. *Jones v. State Board of Education* 279 F.Supp. 190, 200 (M.D. Tenn. 1968). *Accord, Scoggin v. Lincoln University* 291 F.Supp. 161 (W.D. Mo. 1968).

In examining the disciplinary proceedings in question here, it is apparent that the requirements of due process were met. The appellees admitted receiving prior notice of the disciplinary action which stated that the action was grounded on a charge of disorderly conduct arising from their participation in the rally held on January 23, 1969. They also admitted that they were told, in the letter notifying them of the proceedings, that the police report would be used as evidence against them and were told where to obtain a copy.

The appellees were thus provided with ample opportunity to prepare a rebuttal to the proposed evidence and to prepare their defense. However, they failed to do either. This

silence, it should be noted, necessarily constitutes part of the record on which the disciplinary action was based and must be considered in determining whether substantial evidence existed for the finding that the appellees were engaged in disorderly conduct.

Finally, the disciplinary proceedings met the last requirement of due process in that the discipline was based on "substantial evidence." Preliminarily, it should be remembered this Court announced the principal guide to the meaning of those terms in *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 217, 83 L.Ed. 126 (1938). Justice Hughes stated: "substantial evidence is more than a scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." A later decision clarified the meaning even further in stating that substantial evidence "means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred . . . [I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *NLRB v. Columbian Enameling & Stamping Co.* 306 U.S. 292, 300, 59 S.Ct. 501, 505, 83 L.Ed. 660 (1939); *Illinois Central R. Co. v. Norfolk & W. R. Co.*, 385 U.S. 57, 66, 87 S.Ct. 255, 260-261, 17 L.Ed.2d 162 (1966). The test as to whether there is substantial evidence, moreover, must be made in light of the whole record. *Universal Camera Corp. v. NLRB*, 340 U. S. 474, 489, 71 S.Ct. 456, 465, 95 L.Ed. 456 (1951).

It is submitted that contrary to the Ninth Circuit's holding, there was substantial evidence in the whole record to support the disciplinary action taken. The police report identified the appellees by name and, as more fully discussed below, constituted substantial evidence of their participation

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in a prohibited rally which in turn constituted disorderly conduct under Title 5, section 41301 of the California Administrative Code. (See Appendix C). Moreover, the appellees made no attempt to rebut that testimony or produce any kind of defense even though they were afforded ample opportunity.

Thus, conflict and confusion arises from the holding in the lower courts. In other jurisdictions, the courts have warned against analogizing disciplinary hearings to criminal and civil trials. See *Dixon v. Alabama State Board of Education, supra.* Moreover, they have specifically held that the right to cross-examine is not inherent in the proceedings and that documentary evidence is admissible whether under oath or not and may support findings of disciplinary committees. The Ninth Circuit, however, has rejected these holdings and has, in fact, foisted upon the public educational institutions the heavy machinery of procedural due process which normally attends criminal and civil trials.

2. In Conflict with the Holding of This Case, the Eighth Circuit Previously Decided That Attendance at Any Unlawful Assembly Is Substantial Evidence of Misconduct

The Eighth Circuit has held that a school has inherent authority to maintain order and to discipline students.[2] Furthermore, it has the right to regulate activity if relevant to a lawful mission, process or function of the educational institution. *Esteban v. Central Missouri State College, supra* at 1088. The court went on to state, however, that such regulations must focus on aggressive and violent demonstration and actual or potential disruptive conduct. *Id.* at 1087. In light of the history of violence at San Francisco State College in the school year in question, and the record of

2. Cf. *Hammond v. South Carolina State College,* 272 F.Supp. 947, 949 (D.S.C. 1967).

damage and destruction as well as interruption of the business of the school, control of mass gatherings by administrative officials was an appropriate subject for regulation. The regulation in effect at the time was, in fact, within the inherent authority of the school as announced in *Esteban v. Central Missouri State College, supra.* Promulgated by appellant S. I. Hayakawa, the regulation, as is pertinent, is as follows:

> "It is not the intention of this administration to deny freedom of expression but the principle of appropriate place and time will apply. People wishing to hold outdoor meetings or rallies in January may do so on the athletic field, which may be reserved for this purpose by application through the Dean of Students to the Division of Health, Physical Education and Recreation. On the athletic field amplification equipment may be used. However, the meetings shall be conducted and the crowds dispersed in such a way as not to disturb classroom activities, the peace and quiet of the central campus and its adjoining academic buildings, or the peace of the community surrounding the college."

On January 23, 1969, a group of about 800 persons gathered on campus in violation of this regulation. Subsequently, many were arrested including the appellees. Notation of the arrests was contained in the police report on all involved in this demonstration. Moreover, affidavits were introduced in the lower court which showed that the students were warned that the mass gathering was in violation of school regulation, that it constituted an unlawful assembly and that they must disperse. (See affidavit of Edwin C. Duerr, appended hereto as Appendix D). These facts were reiterated in a police report which was also made part of the record below. The court, however, concluded that there was no substantial evidence that students com-

mitted a disorderly act or failed to disperse. It held that there was no evidence regarding the actual participation or extent of participation of the appellees in the unlawful assembly. Implicit in this holding was the reasoning that the school had to show by substantial evidence that the appellees were more than mere spectators and that they were actually involved in one way or another with the demonstration then taking place. This is in direct conflict with the holding in *Esteban v. Central Missouri State College, supra,* which held that mere presence at a mass gathering which was in itself unlawful constituted substantial evidence of misconduct. At page 1085, the court stated:

> "Here, again, we are not persuaded as to Roberds' peaceful spectator status or that the court's findings as to him have no substantial support in the record. Roberds was present at, and as a part of, the milling mass on both nights. He was there as 'a part of the gathered crowd.' He, too, may not have stopped any automobile or rocked it or forced out its occupants or damaged property, but these incidents took place and were caused by the mob and he was a part of that mob. Mob action or, for that matter, the old style lynching action, always presents to the self-proclaimed 'spectator' the opportunity to claim that he was merely watching, that he did not participate, and that someone else did the job. But *one may participate by being present* . . . ." (Emphasis added.)

Thus, there is obvious confusion and conflict between the Eighth Circuit Court holding that presence at a prohibited assembly constitutes substantial evidence of participation which is itself misconduct and can thereby subject one to disciplinary proceedings, and the Ninth Circuit which has held in this case that proof of presence does not constitute substantial evidence of misconduct and cannot support disciplinary action.

3. The Decision Below Is Erroneous

A. THE POLICE REPORT CONSTITUTED SUBSTANTIAL EVIDENCE

San Francisco State, it must be remembered, had been the scene of mass demonstrations, destruction and confusion for several months prior to the incident which gave rise to the grievances herein. Because of the explosive situation, Acting President S. I. Hayakawa issued a regulation confining mass gatherings to the Athletic Field upon approval by administrative officials. If the ban was legally sufficient, it must follow that the mere violation of such ban would warrant some sanction—otherwise the ban would be meaningless.

It would further follow that proof needed to establish such violation (i.e., the presence of a given student at the time and place of the prohibited assembly) would be a matter of simple identification. Such identification is found in the police report and needs no further elaboration.

In holding that there was no substantial evidence of misconduct, the lower court implicitly held that the mere identification of students is not sufficient to establish participation or disorderly conduct but rather specific evidence must be introduced to individuate conduct. The court found that no such evidence was introduced. Such finding was erroneous in light of the fact that the individual names of the appellees do appear on that police report. Moreover, the following portions of the police report evidences that appellees were personally warned that their presence constituted an unlawful assembly and that they must disperse:

> "At 12:30 P.M., the following announcement was made by Lieutenant GEORGE EMIL of the San Francisco Police Department. 'I am Lieutenant GEORGE EMIL of the San Francisco Police Department. On authority of Section 726 of the Penal Code of the State of California, I hereby advise you that the persons demonstrating here are unlawfully assembled. By authority vested in me by the State of

California as a peace officer, I hereby command you in the name of the People of the State immediately to disburse'[sic].

"The above announcements were made by amplified voice, *clearly audible for a distance of over one-half mile.*

"At 12:40 P.M. this date, all units of the Police Department detailed to the San Francisco State College under the command of Captain NELLO GIROLAMI and Captain DONALD SCOTT, were ordered to surround and *arrest all people who did not disperse* from said unlawful assembly.

"At 12:42 P.M., the Tactical Unit of the San Francisco Police Department surrounded and commenced to arrest the below named suspects, as ordered."

Some 450 persons were arrested subsequent to the specific warning to disperse. All students were subject to disciplinary action.[3]

It would be unfair to require anything more of the college in processing all the disciplinary actions resulting from this event than the police report showing the arrest. In the first place, the number of hearings resulting from the incident substantially prevents the specific identification of each student by the specific patrolman who made the arrest. In the second place, no other evidence is necessary because the police report does indicate the names of the individuals on the scene of the unlawful assembly after warning to disperse. It cannot be disputed, therefore, that the appellees were at least present at the unlawful assembly after the warning to disperse was issued. Since presence constitutes the participation in the conduct prohibited (i.e., the assem-

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3. For a complete description of the incident giving rise to this grievance, see "SHUT IT DOWN! A COLLEGE IN CRISIS, SAN FRANCISCO STATE COLLEGE, OCTOBER, 1968—APRIL, 1969. A Report to the National Commission on the Causes and Prevention of Violence" by WILLIAM H. ORRICK, JR., Director, San Francisco State College Study Team, June 1969.

bly of people at the prohibited site), the police report is substantial evidence that the students were engaged in prohibited conduct.

B. ENGAGING IN A PROHIBITED RALLY CONSTITUTES DISORDERLY CONDUCT

Pursuant to section 41301 of Title 5 of the California Administrative Code (in effect at the time in question) students may be placed on probation, suspended or expelled for one or more of the following causes:

(a) Disorderly, unethical, vicious, or immoral conduct.

(b) Misuse, abuse, theft, or destruction of state property. (See Appendix C)

The appellees were charged with disorderly conduct for participating in the prohibited rally on January 23, 1969. The courts below, however, found that there was no substantial evidence to show disorderly conduct despite the police reports and numerous affidavits outlining the events of the night. The implicit holding is, therefore, that the police reports and affidavits were not evidence of "disorderly conduct" even though they showed that (1) the noise disrupted work and classroom activities; (2) the assembly was prohibited; (3) notice was given to that effect; (4) an order to disperse was given; and (5) the appellees remained at the assembly after the order to disperse was issued.

Implicit in this holding is the belief that the appellees could have been present as mere innocent spectators who were not contributing to the noise and, generally, to the unlawful assembly and that, therefore, it would be entirely unfair to discipline them for that conduct.[4] However, it

4. *Esteban v. Central Missouri State College, supra,* however, holds to the contrary. The court there found that even though the students were innocent spectators, they were subject to discipline because they were *present* at an unlawful assembly, were warned to disperse, but failed to do so.

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should be remembered that the crowd, including the appellees, was specifically warned to disperse over a loudspeaker system that could be heard over a one-half mile radius. By their continued presence despite these audible warnings, their conduct cannot in any sense be termed innocent. By their continued presence, they were deliberately challenging rules and regulations which they knew were in effect. By their continued presence, the appellees were inviting arrest and discipline. *e.g., Jones v. State Board of Education,* 279 F. Supp. 190 (M.D. Tenn. 1968)

Finally, in determining whether the appellees' mere presence at the rally on January 23, 1969, constituted "disorderly conduct" pursuant to section 41301(a) of Title 5 of the California Administrative Code, it should be noted that the appellees attended the rally despite regulations prohibiting it. (See Appendix D). Furthermore, they remained at the rally despite numerous orders to disperse. The appellees might contend that that in itself does not constitute disorderly conduct; however, as appellant Edwin Duerr stated in his affidavit (Appendix D), the rally did interrupt the normal working routine of school employees and students by the noise it produced and by the crowd's obstruction of the campus. The conclusion is inescapable that appellees knowingly engaged in disruptive conduct to the detriment of the educational process.

It is well recognized that not only do public institutions have the right to make valid regulations,[5] but also that students are obliged to abide by them. *Dixon v. Alabama State Board of Education, supra; Estaban v. Central*

5. There is no issue as to the validity of the regulation prohibiting rallies except upon approval in the Athletic Field. The court below narrowed the issue to a determination of whether there was substantial evidence to support discipline. The validity of such regulations was sustained by the court in *Esteban v. Central Missouri State College, supra.*

Missouri State College, supra. It follows, therefore, that disobedience of regulations is not "orderly conduct" under any definition of those terms. Any other conclusion would make school regulations meaningless.

It also follows that disobedience to orders given by administrative officials is not "orderly conduct." The conclusion must be, therefore, that such disobedience amounts to disorderly conduct under section 41301(a) of Title 5 of the California Administrative Code and thereby subjects the students involved to disciplinary action. The police record of arrest which is proof of attendance at the rally in disobedience of the regulation and verbal orders given that day must, therefore, be considered substantial evidence of disorderly conduct.

CONCLUSION

For the reasons stated, it is respectfully urged that this court grant the Petition and issue a writ of certiorari.

Respectfully submitted

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(Appendices Follow)

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Appendix A

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Filed—Apr 24 1969

In the United States District Court for the Northern District of California

No. 50983

MASON WONG, PATRICIA WOOLMAN through MORRIS WOOLMAN her Guardian Ad Litem, and on behalf of all others similarly situated,

Plaintiffs,

vs.

S. I. HAYAKAWA, Acting President of San Francisco State College, individually and in his official capacity; and EDWIN C. DUERR, Coordinator of Internal Affairs, San Francisco State College, in his official capacity,

Defendants.

ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION

This case involves the student discipline of Mason Wong and Patricia Woolman, students at San Francisco State College, a state institution.

Plaintiffs have asked the Court to declare this to be a class action. This request is denied because the merits of the case of each student presumably within the class will depend upon the substantiality of the evidence introduced at the

disciplinary hearings on the charges made against each student.

While the requirements of due process do not demand an inflexible procedure for all student discipline cases, certain minimal requirements must be met. Those prescribed in *Scoggin vs. Lincoln University*, 291 F. Supp. 161 at 171, are in this Court's view applicable to the instant case. They are:

> "First, the student should be given adequate notice in writing of the specific ground or grounds and the nature of the evidence on which the disciplinary proceedings are based." "Second, the student should be given an opportunity for a hearing in which the disciplinary authority provides a fair opportunity for hearing of the student's position, explanations, and evidence." "The third requirement is that *no* disciplinary action be taken on grounds which *are not supported by any substantial evidence.*" (Emphasis added)

Here the first two requirements were met, but the third was not. There is no evidence that either of these students committed a disorderly act or for that matter even that he failed to disperse. True they are named (but never identified by anyone at the disciplinary hearings) in a police report, which was admitted in evidence (and properly so even though it is hearsay). But again the fact remains that nowhere in that report nor elsewhere in the record made at the disciplinary hearing is there any evidence (not one fact, not one word) that reflects any act that Wong or Woolman did or failed to do that could be deemed "disorderly". The recitation in the police report that:

> "At 12:40 p.m., units of this Department detailed to San Francisco State College, under the command of Captain Nello Girolani and Donald Scott, effected the arrests of a large number of participants and *subjects* were *booked* at City Prison for participating in an

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unlawful assembly, refusal to disperse and disturbing the peace." (Emphasis added)

followed by a listing of arrests by the police officers with a recitation that one Mason Wong and one Patricia Woolman were among the approximately 454 *suspects* arrested, is not proof of proscribed conduct. Such listing is not evidence that either Wong or Woolman committed a disorderly act. It is not even evidence that either of them failed to disperse.

And that, and that alone, is the so called substantial evidence upon which the disciplinary authority relied. *No disciplinary action can be taken which is predicated upon suspicion and suspicion alone.* The petitioning students were disciplined unlawfully and in violation of the due process clause of the Fourteenth Amendment.

The order placing Mason Wong on probation and the order reprimanding Patricia Woolman are vacated and set aside; the defendants are ordered and directed to expunge from their records such orders; and the defendants are enjoined from taking any disciplinary action against plaintiffs unless and until such action is based upon evidence that plaintiffs, or either of them, were engaged in activity or behavior which would sustain disciplinary sanction.*

Dated: April 24, 1969.

ALFONSO J. ZIRPOLI

UNITED STATES DISTRICT JUDGE

*It is hoped that similar remedial action as that provided in this order will be taken by the College authorities for all other students who have been disciplined solely on the basis of the police report referred to in this order.

Appendix B

United States Court of Appeals
For the Ninth Circuit

No. 24,456

MASON WONG, PATRICIA WOOLMAN through MORRIS WOOLMAN her Guradian Ad Litem, and on behalf of all others similarly situated,

Plaintiffs-Appellees,

vs.

S. I. HAYAKAWA, Acting President of San Francisco State College, individually and in his official capacity, and EDWIN C. DUERR, Coordinator of Internal Affairs, San Francisco State College, in his official capacity,

Defendants-Appellants.

[August 9, 1972]

Appeal from the United States District Court for the Northern District of California

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Before: KOELSCH and HUFSTEDLER, Circuit Judges, and

*JAMESON, District Judge.

KOELSCH, Circuit Judge:

This is an appeal by the President and certain other officials of San Francisco State College, a state institution,

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*Honorable W. J. Jameson, Senior United States District Judge, Billings, Montana, sitting by designation.

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from an order of the United States District Court, granting Mason Wong and Patricia Woolman (hereafter plaintiffs) a preliminary injunction.

Plaintiffs were students at San Francisco State College during the period in late 1968 and early 1969, when the campus was the scene of a series of violent rallies and lawless protests. During one such occasion, on January 13, 1969, plaintiffs were caught up in the police dragnet which swept the central campus and, together with numerous other persons, were arrested and formally charged with several criminal offenses: participating in an unlawful assembly, disturbing the peace and refusing to disperse. Shortly afterward, and while the criminal charges remained pending, the college commenced separate disciplinary proceedings against Wong, Woolman and many of the other alleged student participants. Following hearings, the Disciplinary Committee, concluding that plaintiffs had participated in the disturbance, recommended that the college punish them. Thereupon, plaintiffs filed this suit, purportedly as a class action to enjoin defendants from acting upon any recommendation of the Committee "until plaintiffs and members of their class are given a fair due process hearing. . . ." Pending trial on the merits, plaintiffs asked for a preliminary injunction.

In substance, plaintiffs' claim, as set out in their complaint, is that the Disciplinary Committee misinterpreted and erroneously applied the state statute which permits punishment of students for academically-related misconduct; that the regulations of the college do not provide, and plaintiffs were not given, fair notice of a disciplinary proceeding; that the procedures were fundamentally unfair and that no proof was adduced which tended to support the Committee's decision and recommendation.

The application for the preliminary injunction was heard, as such matters generally are, on a record consisting of plaintiffs' verified complaint, together with supporting affidavits and defendants' counter-affidavits. Following that hearing the court ruled that the claim was not the subject of a class action and could not be prosecuted as such; in addition, the court rejected all of plaintiffs' due process contentions save one. Thus, the court, applying the well recognized test stated in the case of *Scoggin v. Lincoln University*, 291 F. Supp. 161 at 171 (D.C. W.D. Mo. 1968), concluded that the notice given and procedure followed at the hearing were constitutionally adequate but that the Committee had acted without any proof, showing or tending to show, that plaintiffs had misbehaved; with respect to the latter issue, the court found that "there is no evidence that either of these students committed a disorderly act or for that matter even that he failed to disperse." The court's ensuing injunctive order, in effect, affirmatively directed the defendants to expunge from plaintiffs' school records all reference to disciplinary action, to reinstate them to good standing as students and not to take any disciplinary action against them "unless and until such action is based upon evidence that plaintiffs, or either of them, were engaged in activity or behavior which would sustain disciplinary sanctions." In short the order, although denominated a preliminary injunction, did not simply preserve the status quo ante litem but gra. ed plaintiffs the full relief to which they might be entitled if successful at the trial. However, on this appeal, defendants do not question the scope of the order; nor do defendants contend that there is no substantial question to be tried or that plaintiffs will not suffer injury, irreparable in nature as a result of the disciplinary measures taken and to be taken against them; what defendants do contend is the finding of the Disciplinary Com-

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mittee upon which the recommendation was based is supported by substantial evidence and that, therefore, the district court abused its discretion in granting the injunction, because there can be no likelihood of plaintiffs' ultimate success on the merits. *King v. Saddleback Junior College District*, 425 F.2d 426 (9th Cir. 1970).

We cannot agree that on this record the preliminary injunction was improvidently granted. Plaintiffs, in their affidavits, asserted that the "sole evidence" introduced against them at their disciplinary hearings was a police report concerning the occurrence which occasioned their arrest. And if that should ultimately prove to be true, then what it discloses falls short of substantial proof of misconduct. The College Coordinator of Internal Affairs, in a measure at least, corroborated plaintiffs' assertion, for he in turn declared that the report constituted the School's "primary evidence." This report, which was attached to one of defendants' counter-affidavits as an exhibit, is a document 14 pages in length, purportedly made by a Lt. George Emil of the San Francisco Police Department. The first two pages consist of a general account of the incident of January 13, while the remaining 12 pages list the names of 454 persons who were arrested at the time. Among the names were those of the plaintiffs. Nowhere else in the report is there any mention made of plaintiffs, nor is there any statement as to their particular conduct. About all that the report reveals is that all of the 454 persons who were named in the list were arrested; it says: "at 12:40 p.m. units of this Department detailed to S.F. State College, under the command of Captains Nello Girolami and Donald Scott, effected the arrests of a large number of the participants and subjects were booked at City Prison for participating in an unlawful assembly, refusal to Disburse (sic) and Disturbing the Peace." The remaining affidavits likewise shed no light on any activity of either plaintiff; so far as revelant,

they supply background material concerning the demonstration.

The order of the district court, granting plaintiffs a preliminary injunction, is affirmed.

Appendix C

41301. Probation, Suspension, or Expulsion of Students. Any student of a state college may be placed on probation, suspended, or expelled for one or more of the following causes:

(a) Disorderly, unethical, vicious, or immoral conduct.

(b) Misuse, abuse, theft, or destruction of state property.

Appendix D

AFFIDAVIT

I, EDWIN DUERR, being duly sworn, depose and say:

I am the Coordinator of Internal Affairs at San Francisco State College. By virtue of such position, I am responsible for conducting disciplinary hearings arising out of charges of misconduct on the part of students. The hearings are conducted pursuant to procedures promulgated by Acting President S. I. Hayakawa (Exhibit 1). A pool of faculty to serve as hearing panel members was selected by contacting the Academic Senate, faculty organizations and also from recommendations of faculty and administration. Any faculty member who volunteers is eligible to serve on a hearing panel. Hearing panels are composed of three faculty members. Each panel is selected as follows:

When a faculty member volunteers to serve on a panel, his name is placed on an alphabetical list together with the times his schedule will permit him to serve. When a hearing has been scheduled, this list is consulted and panel members are selected alphabetically, taking into account the time they will be available to serve. This process is attended to by my secretary, Miss Susan Tashima.

On January 6, 1969, Acting President Hayakawa declared an emergency to exist on the campus of San Francisco State College (Exhibit 2) which included a temporary ban on rallies in the center of the campus. Rallies (including the use of amplification equipment), were permitted on the athletic field. Copies of this order were displayed prominently on the campus and appeared in the press, radio and television. On January 23, 1969, a rally was held in the central area of the campus. Previous rallies had culminated in acts of violence and in destruction of property. Amplification equipment was employed by those leading

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the rally and the crowd was loud and boisterous. After the rally had commenced, a representative of the Administration read a notice over the public address system on the roof of the Administration Building informing those attending the rally that their conduct constituted an unlawful assembly and directing them to leave the central area of the campus. They were informed that they could move to the Women's athletic field if they so desired. After approximately 10 (ten) minutes had elapsed, they were informed by the police that their conduct constituted an unlawful assembly and were directed to disperse. A short time later, the San Francisco police department surrounded and arrested those who had failed to disperse. Among those arrested were Mason Wong and Patricia Woolman, Plaintiffs in this action.

Miss Woolman was notified by letters dated February 7, 1969 and February 28, 1969 of the time and place of her hearing (Exhibits 3 and 4 respectively). Miss Woolman withdrew from San Francisco State College on February 28, 1969. The hearing was held on March 6, 1969 at the college. Miss Woolman appeared and was represented by counsel. The primary evidence introduced against her was a police report dated January 23, 1969 (Exhibit 5) and Exhibit 2 herein. Miss Woolman declined to testify in her own defense but did introduce evidence through her counsel that she was a freshman student, had a good academic record, had not been found to have engaged in prior disorderly conduct, and was presently in the process of withdrawing from school. The panel found that Miss Woolman had committed the act charged (attendance at the rally and failure to leave the area when ordered to do so), that the act constituted disorderly conduct and recommended Miss Woolman be given a written reprimand to be included in her permanent record. This letter of reprimand was mailed March 20, 1969 (Exhibit 6).

Mason Wong was notified of the time and place of his hearing by letters dated February 7, 1969 and February 26, 1969 (Exhibits 7 and 8 respectively). The hearing was held on March 7, 1969 at the college. Mr. Wong appeared and was represented by counsel. The primary evidence introduced against Mr. Wong was a police report dated January 23, 1969 (Exhibit 5) and Exhibit 2 herein. Mr. Wong declined to testify and offered no evidence in mitigation of penalty, either personally or through his attorney.

The panel found that Mr. Wong committed the act charged, that his behavior constituted disorderly conduct and recommended to the president that he be suspended for six months and placed on probation for two years. The president has not yet acted on this recommendation.

There were 252 students arrested in the rally of January 23, 1969. Approximately 21 hearings for these persons have been held to date. These hearings are presently proceeding at the college.

To the best of my knowledge, no one at the college has signed any criminal complaint arising out of participation in the rally.

EDWIN C. DUERR
Edwin C. Duerr

State of California
City and County of San Francisco } ss.

Subscribed and sworn to me this 28th day of March, 1969 in San Francisco, California.

CLAYTON P. ROCHE
Deputy Attorney General